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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re LEANNA H., a Person Coming Under the
Juvenile Court Law.

TUOLUMNE COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

HUGO H.,

Defendant and Appellant.

F069052

(Super. Ct. No. JV7275)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Tuolumne County. James A.
Boscoe, Judge.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Cornell, J. and Gomes, J.

Hugo H. appealed from the juvenile court's order terminating his parental rights (Welf. & Inst. Code, § 366.26)¹ as to his three-year-old daughter Leanna. After reviewing the juvenile court record, Hugo's court-appointed counsel informed this court that he could find no arguable issues to raise on Hugo's behalf. This court granted Hugo leave to personally file a letter setting forth a good cause showing that an arguable issue of reversible error exists. (*In re Phoenix H.* (2009) 47 Cal.4th 835, 844 (*Phoenix H.*).

Hugo submitted a letter in which he identifies four issues he claims merit our review: (1) the juvenile court's infringement of his parental and due process rights by subjecting him to dependency proceedings even though it did not sustain any allegations against him under section 300; (2) the juvenile court's failure to find that the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.) applied; (3) the failure of the Tuolumne County Department of Social Services to adequately assess his relatives for placement under section 361.3, subdivision (a); and (4) the juvenile court's failure to find that the beneficial exception to adoption under section 366.26, subdivision (c)(1)(B)(i) applied.

We conclude Hugo failed to make a good cause showing that any arguable issue of reversible error arose from the termination hearing. (*Phoenix H.*, *supra*, 47 Cal.4th at p. 844.) Consequently, we dismiss the appeal.

PROCEDURAL AND FACTUAL SUMMARY

In September 2012, the San Joaquin County Human Services Agency (agency) removed then 10-month-old Leanna from the custody of her mother after the mother was arrested for driving under the influence with Leanna in the car. At the time, Hugo was living in Tuolumne County.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

The agency filed a dependency petition on Leanna's behalf, alleging under section 300, subdivisions (b) and (g) that the mother failed to protect Leanna and left her with no support. The petition did not include any allegations against Hugo.

The San Joaquin County juvenile court adjudged Leanna its dependent as alleged after Hugo and the mother submitted to the court's jurisdictional determination. The juvenile court transferred the case to Tuolumne County and the Tuolumne County Department of Social Services (department) placed Leanna in a foster home.

In January 2013, the Tuolumne County juvenile court accepted the juvenile case and set the dispositional hearing for February 2013. Hugo and the mother each signed a Parental Notification of Indian Status (ICWA-020) stating they did not have Indian ancestry.

In February 2013, at an uncontested dispositional hearing, the juvenile court found the ICWA did not apply, ordered Leanna removed from Hugo and the mother's custody, and ordered reunification services for Hugo, including weekly supervised visitation. At a separate dispositional hearing in April 2013, the juvenile court denied the mother reunification services. Neither Hugo nor the mother appealed from the juvenile court's dispositional findings and orders.

During the ensuing months, Hugo regularly visited Leanna and interacted appropriately with her. However, he waited until June of 2013 to engage in services, leaving him little time to demonstrate any significant progress. In addition, he maintained a relationship with mother even though she was hospitalized multiple times as a result of her drug use while living with Hugo and overdosed twice on methamphetamine in his home. Further, Hugo knew that he would not be able to have custody of Leanna if he remained in a relationship with mother. The department questioned whether Hugo recognized the signs of drug abuse or whether he was simply indifferent. In either case, the department did not believe Leanna would be safe in his

care. Consequently, the department recommended the juvenile court terminate Hugo's reunification services and set a section 366.26 hearing.

In August 2013, following a contested six-month review hearing, the juvenile court terminated Hugo's reunification services and set a section 366.26 hearing. The court also reduced Hugo's visitation with Leanna to once monthly. Hugo challenged the juvenile court's setting order by writ petition, which this court denied. (*Hugo H. v. Superior Court* (Dec. 3, 2013, F067933) [nonpub. opn.])

In its report for the section 366.26 hearing, the department recommended the juvenile court terminate parental rights and free Leanna for adoption. The department also informed the juvenile court that in December 2013, Hugo claimed Indian ancestry through a Honduran tribe but the tribe was not a federally recognized tribe under the ICWA.

The department also informed the juvenile court that in September 2013, paternal aunt Angela H. expressed an interest in having Leanna placed with her. Angela H. said she did not request placement sooner because Hugo assured her everything was progressing positively. The department submitted a home evaluation referral and arranged visitation for Angela H. Angela H. visited Leanna in October and December 2013, but did not request regular visitation with her. Angela H. brought her children to the December visit, which was supervised by the department. According to the department, Angela H. was forceful and aggressive in her efforts to engage Leanna in play. The department did not recommend placing Leanna with Angela H. because Leanna had been with her foster parents since March 2013 and was bonded to them.

In January 2014, the juvenile court conducted a contested section 366.26 hearing. Hugo's attorney informed the court that Hugo was a member of the Lenca Tribe of the Tomala Lempira in Honduras and argued it would be discriminatory to exclude it from the ICWA provisions even though it is not a federally recognized tribe. The court

disagreed. Hugo's attorney next called Hugo's sister, Angela H., to testify in an effort to show that the department failed in its duty to assess her for placement.

Angela H. testified that she knew Leanna from the time she was born and visited her every week. Angela H. said she first contacted the department about placement of Leanna in September 2013, after Hugo told her that the plan for Leanna was adoption. She said she was willing to adopt Leanna or assume legal guardianship.

Hugo testified it would be harmful to Leanna to sever his relationship with her. He also testified that the mother was Leanna's sole care provider but that he maintained contact with Leanna. He said he no longer had a relationship with the mother.

Social worker Emily Flosi testified she first became aware that Angela H. wanted Leanna placed with her in September 2013. That same month, the department submitted a home evaluation referral to the licensing department to investigate Angela H.'s home situation. The home evaluation had not been completed. As of December 2013, Angela H.'s home had not been evaluated and the live scan results had not been received. Flosi did not know whether the delay in completing the home evaluation was attributable to Angela H. Flosi further testified that her supervisor told Angela H. she could request visits but the department did not contact Angela H. to offer them to her.

At the conclusion of the contested hearing, the juvenile court found that the department satisfied its duty of assessing Angela H. for relative placement and that any delay was attributable to her. The court also found that Leanna was likely to be adopted and that none of the exceptions to adoption, including the beneficial relationship exception, applied. Consequently, the juvenile court terminated Hugo and the mother's parental rights and selected adoption as Leanna's permanent plan.

This appeal ensued.

DISCUSSION

We begin our discussion by addressing Hugo's contention that the juvenile court violated his parental and due process rights. The violations occurred, he contends,

because the juvenile court “lumped” him in with the mother under a “theory of collective guilt or guilt by association,” even though the department never lodged any allegations against him. In essence, Hugo is challenging the juvenile court’s exercise of its dependency jurisdiction. The juvenile court may exercise its jurisdiction over a child described under section 300 and any of its subdivisions. The court need only find that one parent’s conduct created the circumstances triggering section 300. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1491-1492.)

In this case, the juvenile court found Leanna to be a minor child described under section 300, subdivisions (b) and (g), based on the mother’s conduct. A challenge to the jurisdictional findings must be made by direct appeal from an appealable dispositional order or the issue is forfeited. (*In re T.W.* (2011) 197 Cal.App.4th 723, 729.) Since Hugo did not challenge the juvenile court’s jurisdictional findings on appeal, he is barred from doing so now.

Hugo contends the juvenile court should have found Leanna to be an Indian child under the ICWA and issued the appropriate orders. An “Indian child” must either be a member of an Indian tribe or eligible for membership in an Indian tribe. (25 U.S.C. § 1903(4).) An “Indian tribe” is one that is federally recognized by the Secretary of the Interior. (25 U.S.C. § 1903(8) & (11).) Hugo has failed to show that the Lenca Band of Indians is a federally recognized tribe under the ICWA.

Hugo further contends the department failed to perform its statutory duty to investigate, assess, and evaluate the availability of relatives for placement. Section 361.3 requires the juvenile court to give preferential consideration to a request by a relative of the child for placement. (§ 361.3, subd. (a).) Section 361.3, subdivision (a) states in relevant part: “In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative” “Preferential consideration,” for purposes of the statute, “means that the relative seeking

placement shall be the first placement to be considered and investigated.” (§ 361.3, subd. (c)(1).) The relatives entitled to preferential consideration for placement are “an adult who is a grandparent, aunt, uncle, or sibling.” (§ 361.3, subd. (c)(2).)

In this case, Angela H. requested placement of Leanna in September 2013. By that time, Hugo’s reunification services had been terminated. Although the relative placement preference applies during reunification, it is unsettled whether it applies afterward. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 320.) Nevertheless, the department promptly initiated a home evaluation for Angela H. On that evidence, the juvenile court found that the department fulfilled its duty to investigate and Hugo fails to show otherwise. Further, even assuming the department was dilatory, Hugo would have to show it was in Leanna’s best interest to be placed with Angela H. and that the juvenile court abused its discretion in declining to do so. (*Ibid.*) He fails to show that is the case and the evidence is to the contrary. By the time Angela H. requested placement, Leanna was bonded to her foster parents.

Finally, Hugo contends he maintained regular visitation and contact with Leanna and she would benefit from continuing their relationship. Therefore, he argues, the juvenile court erred in not finding that the beneficial relationship exception to adoption applied. Once the juvenile court finds that the child is likely to be adopted, it must select adoption as the permanent plan unless it finds a compelling reason for determining that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1)(B). The beneficial relationship exception applies if: (1) “[t]he parents have maintained regular visitation and contact with the child and [(2)] the child would benefit from continuing the relationship.” (§ 336.26, subd. (c)(1)(B)(i).) The party seeking to establish the exception bears the burden of producing the evidence. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 252.)

When a juvenile court rejects a detriment claim and terminates parental rights, the appellate issue is whether the juvenile court abused its discretion in so doing. (*In re*

Jasmine D. (2000) 78 Cal.App.4th 1339, 1351.) For this to occur, the proof offered would have to be uncontradicted and unimpeached so that discretion could be exercised only in one way, compelling a finding in favor of the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 (*I.W.*).)

“To meet the burden of proving the [beneficial relationship exception] the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits—the parent must show that he or she occupies a parental role in the life of the child.” (*I.W.*, *supra*, 180 Cal.App.4th at p. 1527.)

In this case, the juvenile court found that Hugo failed to show that he regularly visited and contacted Leanna, and Hugo fails to point to evidence that would compel a contrary finding as a matter of law. In addition, he fails to show that he occupied a parental role for Leanna.

We conclude Hugo failed to show good cause that an arguable issue exists and we dismiss the appeal.

DISPOSITION

This appeal is dismissed.